

# *Nova Law Review*

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*Volume 20, Issue 2*

1996

*Article 9*

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## Recent Developments in Condemnation Law

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Gary S. Gaffney\*

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## TABLE OF CONTENTS

I.	THE NEW LEGISLATION: AN OVERVIEW .....	831
A.	<i>Attorney's Fees</i> .....	833
B.	<i>Changes to the Rules Concerning Offers of Judgment</i> .....	835
C.	<i>The New "Costs" Provision</i> .....	837
D.	<i>The New Condominium Provision</i> .....	838
II.	COMMENTS ON THE NEW STATUTE .....	838
III.	CASE LAW .....	842
A.	<i>Attorney's Fees</i> .....	842
B.	<i>Inverse Condemnation Access</i> .....	844
C.	<i>Regulatory Takings</i> .....	846
D.	<i>The "Reservation Map" Cases</i> .....	850
E.	<i>Miscellaneous</i> .....	851
F.	<i>Public Purpose</i> .....	854
G.	<i>Valuation Issues</i> .....	855
H.	<i>Business Damages</i> .....	856
I.	<i>Severance Damages</i> .....	857
IV.	CONCLUSION .....	858

This article reviews the significant developments in Florida condemnation law during the period from July of 1994 through July of 1995.

### I. THE NEW LEGISLATION: AN OVERVIEW

Perhaps the most significant development in Florida condemnation law in the last year was the legislature's amendment of chapter 73 of the *Florida Statutes* and particularly those changes which affect the amount of fees and

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costs awarded under the statute.<sup>1</sup> The new law is now collectively embodied in sections 73.032, 73.091, and 73.092 of the *Florida Statutes*. It represents a complete departure from the law as it existed in 1976, when the statute actually *prohibited* fee allocations based solely on a percentage of the condemnation award.<sup>2</sup>

The new version calculates fees almost exclusively on this basis, stating “[e]xcept as otherwise provided in this section, the court, in eminent domain

1. 1994 Fla. Laws ch. 94-162. It should be noted that this article does not discuss the recently enacted Bert J. Harris, Jr., Private Property Rights Protection Act, 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)), as that topic is beyond its scope and treated comprehensively elsewhere.

2. FLA. STAT. § 73.092 (Supp. 1976). The preamendment “offer of judgment” portion of the statute, which acted as a limitation of fees and costs, was contained in § 73.032 of the 1993 statutes. Created in 1990, it is still operative with respect to actions filed prior to the effective date of the new statute. FLA. STAT. § 73.032 n.1 (1995).

The awarding of costs and fees in condemnation cases has a long history in Florida. In 1892, the applicable statute contained a precursor to today’s offer of judgment by providing that all costs were to be paid by the condemnor, except those where “the verdict . . . [was no] greater than the compensation awarded by the viewers.” FLA. REV. STAT. § 1558 (1892). Section 1551 of this version required a 12-man jury and a jury “view.” FLA. REV. STAT. § 1551 (1892).

In 1901, the statute still required a 12-man jury, but it began to allow business damages to businesses in existence for five years on adjoining land or within two miles of the acquisition. COMP. GEN. LAWS FLA. § 5017 (1901). In 1906, § 2020 specifically required the condemnor to pay all costs, including attorney’s fees, and in 1920, § 1649 required that the fee award be included in the verdict.

In 1941, § 73.16 of the *Florida Statutes* required that all of the condemnee’s costs, including attorney’s fees, be set by a jury (except for unsuccessful appeals). FLA. STAT. § 73.16 (1941). By 1963, however, that same section required attorney’s fees and costs to be assessed by the court. FLA. STAT. § 73.16 (1963).

In 1976, fees continued to be assessed by the court, but the judge was given specific factors to consider. FLA. STAT. § 73.092 (Supp. 1976). In addition, the court was prohibited from “bas[ing] [the fee] solely on a percentage of the award.” *Id.* In 1985, section 73.092 was amended to require the condemnee’s counsel to submit detailed statements of the services performed and the time spent performing them. Ch. 85-180, § 37, 1985 Fla. Laws 1300, 1323 (codified at FLA. STAT. § 73.092 (1985)).

In 1987, the legislature recreated the “offer of judgment.” FLA. STAT. § 73.092(6) (1987). Three years later, the 1990 version of § 73.092 required that the court give the greatest weight to any “benefit” achieved by the condemnee’s attorney, with the court to consider the remaining factors secondarily. *Id.* § 73.092 (Supp. 1990). The statute no longer prohibited fee awards based solely on a percentage of the condemnation award, and it placed the “offer of judgment” provision into a separate section. *Id.* § 73.092(6). The 1994 amendment is thus one more link in a long line of legislative tinkering.

proceedings, shall award attorney's fees based solely on the benefits achieved for the client."<sup>3</sup>

### A. Attorney's Fees

By far the most controversial amendment to the statute, and the one which has attracted the most attention, is the new attorney's fees provision contained in section 73.092 of the *Florida Statutes*.<sup>4</sup> Under this newly created section, the "benefit" to the defendant now becomes the sole factor in determining fee awards in virtually all condemnation cases.<sup>5</sup>

The new statute governs all actions in eminent domain filed after October 1, 1994. It requires courts to calculate fee awards based upon on a predetermined statutory schedule: 33% of any "benefit" received by the condemnee up to \$250,000; 25% of any "benefit" between \$275,000 and one million dollars; and 20% of any benefit over that amount.<sup>6</sup> The statute specifically mandates that fees be based *solely* upon these percentages, and as such, the circuit courts are prohibited<sup>7</sup> from looking to any other factors, including, for example, the number of hours reasonably expended by the condemnee's counsel in preparation of the case, the terms of any fee agreement, or any of the enumerated criteria contained in section 73.092(2), which now only applies in restricted settings.<sup>8</sup>

The statute defines the "benefit" to be the difference between the amount the final judgment<sup>9</sup> (excluding interest) and the last written offer

3. FLA. STAT. § 73.092(1) (Supp. 1994).

4. Ch. 94-162, § 3, 1994 Fla. Laws 955, 957 (current version at FLA. STAT. § 73.092 (1995)). The predecessor statute, FLA. STAT. § 73.092 (1993), still controls actions filed prior to Oct. 1, 1994, and is still to be used by the court to determine fees in some limited cases. *Id.* § 4, 1994 Fla. Laws at 959. See discussion *infra* note 8 and accompanying text.

5. FLA. STAT. § 73.092.

6. *Id.* § 73.092(1)(c)(1)-(3). The statute mandates that the court "shall" award fees in the manner it prescribes. *Id.* § 73.092(1).

7. See *Downtown Square Assoc. v. Department of Educ.*, 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

8. FLA. STAT. § 73.092(2)-(3). Sections 73.092(2) and (3) are still to be used, but only in very limited cases, such as when the condemnor has rejected an offer of judgment under the new statute, and the final judgment equals or exceeds that amount. FLA. STAT. § 73.032(6) (1995). The criteria of § 73.092(2)(a)-(g) and (3) are also to be used to calculate fees awarded in *defeating* a taking, or in proceedings considered "supplemental" to an action in eminent domain, such as apportionment. *Id.* § 73.092(2)-(3).

9. The statute actually reads, "between the final judgment or settlement." FLA. STAT. § 73.092(1)(a). At first glance, this terminology may seem a bit confusing (or at least redundant), because any "settlement" would necessarily be integrated into a final judgment, and thus the reference becomes surplusage. However, it must be noted that subsection

made before the condemnee hires an attorney.<sup>10</sup> If no offer is made before the condemnee retains counsel, the benefit is measured from the first offer made *after* an attorney is hired.<sup>11</sup> Generally, the amount of the benefit will include any award made for business damages. However, if the condemnor has made a written request for the condemnee's business records,<sup>12</sup> and the condemnee fails to provide those records, the court must exclude any award for business damages from the benefit calculation.<sup>13</sup>

Unlike the old statute, which merely required the production of the owner's "financial records," the newly worded statute requires "those financial and business records kept by the owner in the ordinary course of business."<sup>14</sup> It is not yet clear what effect, if any, this expanded terminology will have on the production requirement.

With respect to the *time* in which these records are to be produced—at least during *presuit* negotiations—the new statute makes no changes, and still does not require that the records be produced by any specific date.<sup>15</sup> But, if a suit is later filed, and the business owner has still not provided the records, any business-damage benefits are to be based on the first written offer the condemnor makes within 120 days *after* filing the action.<sup>16</sup>

In addition, a newly added portion of this section can be used by the court to extend that 120-day time period even longer.<sup>17</sup> Under the new statute, if the condemnor requests the owner's records through discovery, and does so within forty-five days of the condemnee's answer, the time to make an business damage offer is extended up to sixty days *after* the

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(1)(a)1. specifically governs fees awarded "in prelitigation negotiations" and subsection (1)(a)2. refers to fees awarded *after* litigation. *Id.* § 73.092(1)(a)1.-2. This bifurcation obviously contemplates fee determinations for cases resolved without a judicial determination which would result in a "settlement" rather than a final judgment. *See also* FLA. STAT. § 337.271(6) (1993) (mandating use of criteria found in § 73.092 in fees awarded in *presuit* negotiations with Department of Transportation).

10. FLA. STAT. § 73.092(1)(a). The new section implements some curious housekeeping. The old statute referred to "the benefits resulting to the client from the services rendered." *Id.* § 73.092(1) (1993). The new statute substitutes in its place "the benefits achieved for the client." *Id.* § 73.092(1) (1995). It is too soon to tell what this editing will accomplish, if anything.

11. *Id.* § 73.092(1)(a).

12. *Id.* § 73.092(1)(a)1.-2. The statute refers to the discovery of "financial and business records kept . . . in the ordinary course of business." FLA. STAT. § 73.092(1)(a)1.

13. *Id.* § 73.092(1)(a)1.

14. *Id.*

15. *Id.* Of course, the records would have to be produced sometime prior to litigation.

16. *Id.* § 73.092(1)(a)2.

17. FLA. STAT. § 73.092(1)(a)2.

condemnor receives the records.<sup>18</sup> If the condemnor does not request these records within these allotted time frames, any benefits for business damage awards are based on the difference between the settlement or final judgment and the last written offer made before the condemnee hired an attorney.<sup>19</sup>

The new statute still allows the court to consider so-called “nonmonetary” benefits in calculating the fee award.<sup>20</sup> Such benefits, however, must be obtained “through the efforts of the attorney.”<sup>21</sup> In addition, the new statute requires that all nonmonetary benefits be capable of being “specifically identified” by the court, and reasonably quantifiable.<sup>22</sup>

Another amendment, and one which clearly favors the condemning authority, can be found in section 73.092(1)(a). This portion of the statute was amended so that “interest”—which is typically awarded in almost every civil action—is not to be considered when calculating fee awards to the condemnee’s attorney.<sup>23</sup>

### B. *Changes to the Rules Concerning Offers of Judgment*

The new statutory fee schedule can be modified, but only by way of a newly created “reverse” offer of judgment now available to the condemnee.<sup>24</sup> This new provision authorizes a condemnee to make an offer of judgment for a given amount (up to a limit of \$100,000).<sup>25</sup> If the condemnor then rejects the offer, and the final judgment equals or exceeds the offer (exclusive of interest), the statutory fee schedule is no longer applicable, and the trial court is granted the discretion to utilize the criteria found in sections 73.092(2) and (3) of the *Florida Statutes*.<sup>26</sup>

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18. *Id.* The new statute substantially increases the time frame in which a condemnor may make a business damage offer. The old statute required that such offers be made within 120 days of the *filing of the petition*. *Id.* § 73.092(1)(a)2. (1993). The new statute, on the other hand, could effectively increase that time up to 145 days after the answer is filed (i.e., a discovery request served 45 days after the answer; a response in 30 days; 60 more to make the offer; and 10 days mailing time). *Id.* § 73.092(1)(a) (1995).

19. *Id.*

20. FLA. STAT. § 73.092(1)(b).

21. *Id.* The predecessor statute read, “[t]he court may also consider nonmonetary benefits which the attorney *obtains for the client*.” *Id.* § 73.092(1)(b) (1993) (emphasis added).

22. *Id.* § 73.092(1)(b) (1995).

23. *Id.* § 73.092(1)(a). The amendment added the words “exclusive of interest.”

24. FLA. STAT. § 73.032 (Supp. 1994).

25. *Id.* § 73.032(3).

26. *Id.* § 73.032(6).

The new statute retains a portion of the predecessor provision, and thus now permits *both*<sup>27</sup> the condemnor and condemnee to make such offers.<sup>28</sup> However, while a *condemnee's* offer of judgment can impact the new statutory fee schedule, a *condemnator's* offer of judgment now only acts as a limitation on costs, not on attorney's fees (as it did under the previous statute).<sup>29</sup>

There are some similarities to both provisions. In either case, the offer must be in proper form,<sup>30</sup> and it must propose to settle all pending claims (exclusive of fees and costs).<sup>31</sup> If the offer is not accepted in writing within thirty days of filing, it is deemed rejected.<sup>32</sup> If there are less than thirty days before trial when the offer is made, it is deemed rejected if not accepted by the time of trial.<sup>33</sup> An offer may be withdrawn, in writing, before a written acceptance has been filed with the court.<sup>34</sup> The parties can apparently make as many offers as they want under the new statute, but each successive offer "voids" the previous one.<sup>35</sup>

The condemnor can not make its offer of judgment for at least 120 days after the condemnee has filed an answer, and no later than twenty days before trial.<sup>36</sup> If the condemnee rejects the offer, and the final judgment turns out to be equal, or less than, the offered amount, the court may not award any costs to the condemnee which were incurred after the date the offer was rejected.<sup>37</sup>

Similarly, a condemnee's offer of judgment also can not be made earlier than 120 days after the answer is filed, and no later than twenty days before trial.<sup>38</sup> And, as discussed, if the condemnor rejects the condemnee's

27. The predecessor statute only authorized the *condemnator* to make an offer of judgment. *Id.* § 73.032 (1993).

28. *Id.* § 73.032(2)-(3) (1995).

29. FLA. STAT. § 73.032.

30. *See id.* § 73.032(4)(a)1.-7. (1995) for the requirements as to the form and mandatory contents of the offer.

31. *Id.* § 73.032(4)(a)2.

32. *Id.* § 73.032(4)(c).

33. *Id.*

34. FLA. STAT. § 73.032(4)(d). Once withdrawn, the statute deems the offer "void." *Id.* § 73.032(4)(d). Under the old version of the statute, the condemnor (the only party who could make an offer of judgment), could withdraw the offer any time before being *served* with acceptance. *Id.* § 73.032(1)(d) (1993). Now, either party can withdraw its offer up until the time an acceptance is actually *filed* with the court. *Id.* § 73.032(4)(d) (1995).

35. *Id.* § 73.032(4)(c).

36. FLA. STAT. § 73.032(2).

37. *Id.* § 73.032(5).

38. *Id.* § 73.032(3).

offer, and the final judgment is at least equal to the offered amount, the statutory fee schedule is jettisoned, and the court is granted the discretion to award fees based on the criteria found in section 73.092 of the *Florida Statutes*.<sup>39</sup>

### C. The New "Costs" Provision

The legislature also rewrote the costs section of the statute in 1994.<sup>40</sup> The old provision was one sentence long, and merely provided that the petitioner pay "all" reasonable costs of the proceedings, including attorney's fees, appraisal fees, and in business damage cases, accountant's fees.<sup>41</sup>

The new cost provision is more elaborate, more detailed. It is segregated into five separate subsections. The first retains the language of the predecessor statute on "costs," but it now defers directly to the new attorney's fees provision on that issue.<sup>42</sup> A new subsection requires the condemnee to submit detailed time records for each expert witness (including the expert's costs), as well as a copy of any contract which exists between the expert and the condemnee (or the condemnee's attorney).<sup>43</sup> The records must be submitted at least thirty days prior to the cost hearing.<sup>44</sup>

In assessing the reasonableness of the costs, the court is permitted to consider any relevant factors, including those fees and costs which would typically be paid under comparable circumstances to similarly qualified persons.<sup>45</sup> The court is to make specific findings to justify each sum it awards as expert's witness fees.<sup>46</sup> In assessing costs to be paid by the condemnor the court is to be guided by the amount the condemnee would ordinarily be expected to pay if the condemnor was not being held responsible for the costs.<sup>47</sup>

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39. *Id.* § 73.032(6).

40. Ch. 94-162, § 2, 1994 Fla. Laws 955, 957 (current version at FLA. STAT. § 73.091 (1995)).

41. FLA. STAT. § 73.091 (1993). An unjustified rejection of an offer of judgment could limit cost awards under the 1993 version of the statute. *Id.* § 73.092(6).

42. FLA. STAT. § 73.091 (1995).

43. *Id.* § 73.091(2).

44. *Id.*

45. *Id.* § 73.091(3).

46. *Id.* § 73.091(5).

47. FLA. STAT. § 73.091(4). This provision indicates that the "market value" of the services rendered would provide an adequate guide by which such amounts would be awarded.



### D. *The New Condominium Provision*

A newly created section 73.073 establishes the procedures to be followed with respect to the condemnation of common elements of a condominium.<sup>48</sup> The statute requires the condemning authority to identify and notify all of the unit owners in the condominium of any negotiated sale or eminent domain exercise.<sup>49</sup> It also provides minimum requirements for the notice, which must include: 1) the name of the condemning authority; 2) a description of the property; 3) a statement of the "public purpose" for which the property is intended; 4) an appraisal; 5) a "clear and concise" statement of the unit owner's right to object to the taking or the appraised value, detailing the procedures for objection; and 6) a clear and concise statement of the association's right to convey in the absence of an objection.<sup>50</sup>

If the unit owner fails to respond to the notice within thirty days, the owner is deemed to have acquiesced to the appropriate condominium association acting as the owner's representative in all subsequent proceedings.<sup>51</sup> Those owners who do make a proper objection preserve their rights with respect to the taking, to the appraisal of value, and to any other rights which might appertain to unit ownership.<sup>52</sup> If no unit owners object, the condemnor can rely on a power of sale vested in the association.<sup>53</sup> And, in the event litigation becomes necessary, the condemnor need only name the association and the objecting owners as defendants.<sup>54</sup>

## II. COMMENTS ON THE NEW STATUTE

Critics have pointed to several problems with the new statute. First, there may be a serious question as to its constitutionality, particularly with respect to the so-called "benefit" being the only criteria to be used in awarding fees. The resolution of this question might very well hinge on whether the Supreme Court of Florida determines "reasonable" attorney's fees to be an essential component of the "full compensation" due property

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48. Ch. 94-336, § 1, 1994 Fla. Laws 2382, 2382 (current version at FLA. STAT. § 73.073 (1995)). The new law became effective on October 1, 1994.

49. FLA. STAT. § 73.073(2).

50. *Id.* § 73.073(2)(a)-(f).

51. *Id.* § 73.073(3).

52. *Id.*

53. *Id.*; see also FLA. STAT. § 718.112 (1993) (regarding the conveyance powers of the condominium association).

54. FLA. STAT. § 73.073(3).

owners under section 12 of the Declaration of Rights, and Article XVI, section 29 of the *Florida Constitution*. This issue has yet to be decided, and particularly so with respect to the new “percentage-based” statute. And, if “reasonable” attorney’s fees *are* included in the constitutional guarantee of full compensation, then the limitations imposed by the new statute could reduce the condemnee’s award below that guarantee. If so, the statute might be subject to a constitutional challenge on these grounds.

Others claim the new fee statute might be challenged on both substantive and procedural due process grounds as well, in light of the fact that it will most certainly act to deny smaller property owners adequate access to the courts. The new fee limitations have been variously referred to by members of the condemnee bar as “arbitrary,” “draconian,” and “inflexible.”<sup>55</sup> Whatever the outcome, such characterizations indicate that the new statute is sure to be challenged.

The “offer of judgment” provisions in the new statute may prove even more susceptible to challenge. As the supreme court has made clear on a number of occasions—and specifically so in the context of “offer of judgment” statutes—the legislature does not possess constitutional authority to implement rules of court; this power rests exclusively with the Supreme Court of Florida.<sup>56</sup> In fact, the predecessor offer of judgment statute has already been declared unconstitutional by at least one circuit court on grounds that the “procedural”<sup>57</sup> aspects of the statute (drafted by a selected

55. This topic was discussed at some length at the 1994 Condemnation Law Seminar sponsored by the Eminent Domain Committee of the Florida Bar (Oct. 14 - Nov. 14, 1994).

56. In a trio of fairly recent cases, the Supreme Court of Florida made it clear that to the extent “offer of judgment” statutes attempt to regulate court “procedures,” such statutes unconstitutionally impinge on the exclusive rule-making authority granted the supreme court under section 2(a) of Article V of the *Florida Constitution*. See *Timmons v. Combs*, 608 So. 2d 1, 2 (Fla. 1992); *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992); *Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442, 443 (Fla. 1989).

Indeed, as well documented in a recent article in the *Florida Bar Journal*, § 73.032 of the *Florida Statutes* is entirely “procedural,” and, under the authority of the cited cases, is thus unconstitutional. See Richard A. Harrison, *Offers of Judgment in Eminent Domain Cases*, 67 FLA. B.J. 23, 23-28 (Jan. 1993).

57. The “procedural” aspects of the statute include: requirements as to the “form” and contents of the offer; instructions on how and when it is to be accepted, rejected or withdrawn; directions as to its service; and rules governing its admissibility in court. FLA. STAT. § 73.032 (1993). As a matter of fact, almost the entire text of § 73.032 is “procedural” in nature. Moreover, a newly added subsection (1) expressly states that the section is the “exclusive” offer of judgment provision for all actions in eminent domain, thereby precluding the use of any other statute or rule of court (i.e., Florida Rule of Civil

“committee” and then adopted by the legislature) violate Florida’s strict separation of powers doctrine.<sup>58</sup> The new statute retains many, if not all, of the procedural aspects of the old section 73.032, and its constitutionality will most likely be challenged on those same grounds.

In addition (as was discussed), the new statute imposes an upper limit of \$100,000 on any offer of judgment submitted by the condemnee, but places no such limitation on the condemnor.<sup>59</sup> This disparity<sup>60</sup> is sure to be exaggerated, and the statute is sure to be subjected to constitutional challenges based on equal protection and due process grounds in addition to those already mentioned. And there are some practical problems with the new statute as well.

For example, it still permits a condemnor to make an offer of judgment relatively early on in the project; in fact, it may end up submitted even though the petition may not have a complete (and final) set of construction plans.<sup>61</sup> How can a condemnee evaluate an offer without knowing exactly what to ultimately expect from the condemning authority with respect to the project? And, because a *condemnee’s* offer cannot be submitted until after the answer has been filed,<sup>62</sup> if it is used at all, it will most likely result in a (lower) counteroffer, thereby raising the very real threat of a fee-diminished award—with no risk to the condemnor. In any event, because the condemnee is not permitted to make an offer of judgment for more than

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Procedure 1.442) in the event the statute is declared unconstitutional. *Id.* § 73.032 (1995). And, if the statute is declared unconstitutional, condemnees will be left with no power to avoid the bad “benefit” analysis, and will have almost no protection against the unlimited resources of the state.

58. Department of Transp. v. Lee, No. 93-04239-14 (Fla. 17th Cir. Ct. March 20, 1994). The court determined that under well settled principles of Florida law, the legislature cannot create rules of court, that responsibility lies exclusively with the Supreme Court of Florida. *Id.* Accordingly, the court declared § 73.032 of the *Florida Statutes* unconstitutional as applied. *Id.* The author represented the condemnor in the successful constitutional challenge.

59. FLA. STAT. § 73.032(3).

60. Proving that “disparity” might prove more problematic than it appears at first glance, however. Since the differing provisions also have disparate impacts (an unjustified rejection of a *condemnee’s* offer results in a modified fee schedule; a rejection of a *condemnor’s* offer only limits the cost award), any equal protection challenge is certain to be complicated by these dynamics.

61. FLA. STAT. § 73.032(7). Section 73.032(7) does require the condemnor to provide the condemnee with any plans which may “exist” at the time of the offer, but those plans may be incomplete and they are almost never in “final” form. Additionally, although it is unlikely, the express wording of the statute does actually permit the condemnor to make an offer when no plans are in existence at all. *Id.*

62. *Id.* § 73.032(3).

\$100,000, this provision will only be utilized in small cases involving less valuable property or very small businesses.

What will be the result of all of these changes? It is really too soon to tell. Some results are quite predictable, however. Most small cases will be forced to settle. Many condemnees will be forced to appear *pro se*<sup>63</sup> against the government rather than risk a fee-diminished award. The more experienced condemnation lawyers will shy from cases where the “benefit-percentage” potential is not commensurate with the time and effort they might reasonably expect to expend defending such a case.<sup>64</sup> Some of the very large cases will result in windfall fees.

The intent of these legislative changes was to make fee awards in eminent domain cases more equitable. Unfortunately, the new law eliminates much (if not all) judicial discretion, and inserts in its place an unyielding, percentage-based formula which may very well result in unjustifiably large fee awards in the bigger cases, and little compensation—perhaps even less than full compensation—in the smaller ones. Only time will tell; but one thing is for certain, the new statute is sure to be challenged on a number of fronts.

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63. In a case in which the condemnee’s attorney could expect to expend 250 hours to prepare and try an eminent domain action, even a benefit of \$50,000 over the initial offer would yield fees of less than \$75 per hour. Why would an experienced eminent domain attorney take on such a case and perhaps risk an even lesser “benefit,” lesser fees, or go broke in the process? When the action involves even smaller, marginally valuable property interests, the infirmities of the statute are exposed even further. For example, if the property involved is only worth around \$15,000, any “benefit” cannot reasonably be expected to be more than a few thousand dollars. This would make the award of attorney’s fees—through a full blown trial—a couple of hundred dollars. How many attorneys are going to take a case like that to trial—or take it at all? It is likely, therefore, that the property owner is going to end up representing his or herself in the eminent domain action and will probably settle without a fight.

64. Condemnation cases are very often complicated matters. It is not uncommon for both sides to spend several hundred hours in preparation for a trial. Moreover, the condemnee typically retains counsel well before the condemnation petition is even filed, so the attorney may very well have already spent a significant amount of time attempting to settle during presuit negotiations.

Furthermore, the typical valuation case is almost always founded on expert testimony, so pretrial preparation and discovery can intensify the process. The statute also requires the parties to participate in mediation. Thus, a complicated case can take years to resolve. In cases where the potential benefit will be small, there is no motivation for a condemnation attorney to take the case at the statutory fee; and, if the attorney charges a “reasonable” (i.e., hourly) fee, the condemnee’s award will no doubt be reduced by that fee. It is enough to dissuade any property owner to settle or appear *pro se*.

### III. CASE LAW

A number of significant appellate opinions involving issues of condemnation law were reported over the last year. The Supreme Court of Florida itself generated no less than five separate opinions on condemnation law; and the district courts produced another two dozen more, many involving questions of "access." Several of the more significant cases are discussed below.

#### A. Attorney's Fees

In July of 1994, at the very beginning of the survey period, the Supreme Court of Florida issued *Department of Transportation v. Gefen*.<sup>65</sup> In *Gefen*, the plaintiff in an inverse condemnation suit—who had won at the circuit court level but then lost on appeal—requested that fees be awarded under section 73.131(2) of the *Florida Statutes*. In refusing, the court focused on the specific wording of the authorizing statute and declined the award of fees even though the plaintiff had initially been successful at the trial level.<sup>66</sup> Because she was ultimately unsuccessful in her action (i.e., losing after final appeal),<sup>67</sup> the court found she was unable to avail herself of the statutory award of fees.<sup>68</sup>

In *Downtown Square Associates v. Department of Transportation*,<sup>69</sup> the Fourth District Court of Appeal held that it was error for a trial court to consider any factors other than those specifically enumerated in the statutory criteria of section 73.092 of the *Florida Statutes*.<sup>70</sup> Citing several prior cases, the court reversed the portion of the fee award which was not in strict compliance with the statute.<sup>71</sup>

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65. 636 So. 2d 1345 (Fla. 1994).

66. *Id.* at 1347.

67. The supreme court quashed the original taking. *Id.* at 1346.

68. *Id.* at 1347.

69. 648 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1995).

70. *Id.* at 1265-66. The case involved the 1993 version of § 73.092.

71. *Id.* at 1266. See, e.g., *Schick v. Department of Agric. & Consumer Servs.*, 599 So. 2d 641, 643 (Fla. 1992) (stating that if a statute sets forth criteria to be considered in awarding fees, that specific statute controls); *Department of Transp. v. Denmark*, 354 So. 2d 100, 101 (Fla. 4th Dist. Ct. App. 1978) (stating that if a statute does not contemplate other factors in awarding fees, other factors cannot be considered); *Stewart Select Cars, Inc. v. Moore*, 619 So. 2d 1037, 1038 (Fla. 4th Dist. Ct. App. 1993) (noting that where the legislature has set forth certain criteria to be utilized in awarding fees, the trial judge is bound to use only that criteria). This line of cases, when coupled with the newly restrictive fee statute, will effectively handcuff trial courts into issuing fee awards based *only* on "the

In *Whitlow v. South Georgia Natural Gas Co.*,<sup>72</sup> the First District Court of Appeal reversed a fee award because nothing in the lower court's final order disclosed whether it had considered a reduced hourly rate for various non-lawyer services.<sup>73</sup> Citing to section 57.104 of the *Florida Statutes*—which requires courts to consider such facts in formulating fee awards—the court reversed and remanded for further clarification.<sup>74</sup>

In *Department of Transportation v. D.J.P. Associates, Inc.*,<sup>75</sup> the Second District reversed a fee award because of an “ambiguity” contained in the trial court's order.<sup>76</sup> Here, one trial judge had initially conducted the fee hearings, and had issued a letter to the parties explaining his intentions with respect to the fee award. Unfortunately, the judge's calculation was not mathematically accurate; when a successor judge included an enhancement of the hourly award (in order to make the first judge's calculation work), he created an ambiguity in the order which was sufficient to require clarification.<sup>77</sup> The case stands as a strong reminder to trial courts (and to litigants) to be sure and use sufficient detail in drafting condemnation fee awards; and this admonishment becomes even more critical in light of the restrictive criteria contained in the new statute.

Finally, in *Orlando/Orange County Expressway Authority v. Latham*,<sup>78</sup>—a case discussed elsewhere in this article regarding the suppression of expert testimony on the issue of severance damages,—the Fifth District Court of Appeal properly awarded a condemnee appellate attorney's fees for having to defend an appeal brought by the condemnor—even though the condemnee eventually lost the appeal. The court relied on section 73.131 of the *Florida Statutes*, which mandates such an award under these circumstances.<sup>79</sup>

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benefits” achieved, without regard for other criteria.

72. 650 So. 2d 637 (Fla. 1st Dist. Ct. App. 1995).

73. *Id.* at 638.

74. *Id.* (citing FLA. STAT. § 57.104 (1989)).

75. 640 So. 2d 1201 (Fla. 2d Dist. Ct. App. 1994).

76. *Id.* at 1201.

77. *Id.*

78. 643 So. 2d 10 (Fla. 5th Dist. Ct. App. 1994); see discussion *infra* part III.I. and accompanying text.

79. *Id.* at 11; see also *Denmark v. Department of Transp.*, 389 So. 2d 201 (Fla. 1980) (holding that condemnees are to be awarded attorney's fees even if he/she losses on appeal).

## B. *Inverse Condemnation Access*

A number of decisions involving a loss of access were reported during the survey period. While none of these cases seriously impacted on the well-seasoned rules established in cases like *Anhoco Corp. v. Dade County*,<sup>80</sup> and *Palm Beach County v. Tessler*,<sup>81</sup> some raise interesting issues nonetheless.

For example, in June of 1995 in *Rubano v. Department of Transportation*,<sup>82</sup> the Supreme Court of Florida rejected an inverse condemnation claim grounded on a temporary loss of access caused by a major road construction project.<sup>83</sup> In *Rubano*, the construction project temporarily severed the owners' direct access to the highway by eliminating a protected U-turn, and by increasing the travel mileage required to reach the owners' property by one and one-half miles.<sup>84</sup> The circuit court determined that the Department had effected a taking through these activities, but the Fourth District reversed, believing the temporary rerouting of traffic required by the construction was noncompensable.<sup>85</sup> In doing so, the court certified the question to the Supreme Court of Florida as one of great importance.<sup>86</sup>

80. 144 So. 2d 793 (Fla. 1962). In *Anhoco*, the court ruled that although a property owner would be entitled to compensation for a "total" destruction of his access, a taking does not occur when the government merely "regulates" that access through the use its police power, as in prescribing the number and location of driveways, or of other access facilities. *Id.* at 798.

81. 538 So. 2d 846 (Fla. 1989). In *Tessler*, the property owners lost access to their property which resulted in their customers having to travel 660 yards through a residential neighborhood to get to their business. The court concluded that the property owners could recover damages for their loss of access because they had lost "more than their most convenient means of access." *Id.* at 850.

82. 656 So. 2d 1264 (Fla. 1995).

83. *Id.* at 1265.

84. *Id.* at 1266.

85. *State Dep't of Transp. v. Rubano*, 636 So. 2d 749, 750 (Fla. 4th Dist. Ct. App. 1994), *aff'd*, 656 So. 2d 1264 (Fla. 1995).

86. *Id.* at 752-53. The district court only certified as to whether there was a "compensable taking of access." *Id.* at 753. The supreme court formulated the following question on its own volition:

DID THE DEPARTMENT OF TRANSPORTATION ENGAGE IN A COMPENSABLE TEMPORARY TAKING OF ACCESS WHEN IT ELIMINATED PETITIONERS' DIRECT ACCESS TO A STATE ROAD BY PLACING PETITIONERS' PROPERTY ON A SERVICE ROAD, ELIMINATED A PROTECTED U-TURN AND REPLACED IT WITH ANOTHER U-TURN WHICH ADDED ONE AND ONE-HALF MILES OF TRAVEL TO REACH THE PROPERTIES, AND SEVERED THE CONNECTIONS FROM

The supreme court, in a unanimous opinion, found that none of the Department's activities constituted a compensable taking of access.<sup>87</sup>

In a well thought-out, reflective opinion, Justice Anstead addressed each of the Department's activities. First, he characterized the property owners' loss of direct highway access as a noncompensable "diversion of traffic,"<sup>88</sup> comparable to that found in *Department of Transportation v. Gefen*.<sup>89</sup> Next, Justice Anstead noted that the elimination of the U-turn did not sufficiently impair the owners' access to the highway so as to be compensable,<sup>90</sup> and particularly so in light of the fact that the elimination only affected traffic flow in one direction.<sup>91</sup> Finally, the court concluded that the Department's construction of a "service road," built to allow the owners continuing access to the highway during construction did not "completely destroy[]" the owners' access to the highway,<sup>92</sup> and thus were noncompensable.

Similarly, in *Port St. Lucie Shopping Center Associates v. Board of County Commissioners*,<sup>93</sup> the Fourth District Court of Appeal refused to find that the closure of a median cut, requiring eastbound motorists to make a U-turn at the next traffic light, caused an abutting property owner to incur a substantial "loss of access," thus, the closure was noncompensable.<sup>94</sup>

On the other side of the issue, in *Department of Transportation v. Kreider*,<sup>95</sup> the Fourth District Court of Appeal affirmed a trial court order of taking which found that a departmentally-constructed retaining wall had caused a property owner to incur a "substantial loss of access" by: 1) removing the property owner's eastbound access to the highway; 2)

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#### INTERSTATE 95 TO STATE ROAD 84?

*Rubano*, 656 So. 2d at 1265.

87. *Id.* at 1271.

88. *Id.* at 1267.

89. 636 So. 2d 1345 (Fla. 1994) (holding that a redirection of traffic, as opposed to an actual deprivation of access, is not compensable).

90. *Rubano*, 656 So. 2d at 1268 (citing *Division of Admin. v. Capital Plaza*, 397 So. 2d 682 (Fla. 1981) (holding that construction of median which impedes or impairs traffic flow does not necessarily warrant compensation because property owner has no property right to maintenance of traffic flow past his property)).

91. *Id.* at 1269.

92. *Id.* The court found petitioner's reliance on *Anhoco* misplaced, holding that the property owner incurred compensable taking when its rights of access were "completely destroyed," and not merely regulated. *Id.*

93. 638 So. 2d 202 (Fla. 4th Dist. Ct. App. 1994).

94. *Id.* at 202.

95. 658 So. 2d 548 (Fla. 4th Dist. Ct. App. 1995).



substituting a burdensome<sup>96</sup> alternate route which increased travel well over one mile; and 3) blocking the owner's visibility from the road.<sup>97</sup>

The court pointed out that before and after *Tessler*, the supreme court has narrowly applied the concept of "compensable loss of access,"<sup>98</sup> and noted that the trigger to a *Tessler* analysis is the destruction of direct access to an abutting road.<sup>99</sup> Applying *Tessler*, the court had no difficulty in concluding that the property owner had incurred a "substantially diminished" access.<sup>100</sup>

### C. Regulatory Takings

In an inverse condemnation case which did not involve "access," *City of Pompano Beach v. Yardarm*,<sup>101</sup> the Fourth District Court of Appeal reversed an order of taking which had issued after a two-decade dispute over a construction project.<sup>102</sup> In rejecting the takings claim, the court found no evidence that the defendant City denied the petitioner all use of the subject property. Even though the trial court may have found the City's actions to be variously "illegal," "arbitrary and capricious," and "not taken to promote the public's health, safety and welfare," this did not establish a taking.<sup>103</sup> The court held these characterizations might very well identify a deprivation of "due process," but they do not establish a "taking," which specifically requires a showing that the regulation or restriction has denied the property owner "all economic, beneficial or productive use of the property."<sup>104</sup>

In dealing with the twenty-year old litigation, the Fourth District Court of Appeal issued an extended opinion containing a relatively thorough

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96. In determining that the route was "more burdensome than . . . *Tessler*," the court mentioned the factors of "time, distance, and difficulty of navigation." *Id.* at 550. The court also noted that this case was unlike the typical "traffic flow" case, in that the alternative route was a "one way 'road to nowhere'." *Id.*

97. *Id.* at 549.

98. *Id.*

99. *Kreider*, 658 So. 2d at 549.

100. *Id.* at 550.

101. 641 So. 2d 1377 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1197 (Fla.), *cert. denied*, 115 S. Ct. 2583 (1995).

102. *Id.* at 1379.

103. *Id.* at 1385-86.

104. *Id.* at 1385. In finding as it did, the court rejected the petitioner's contention that its inability to maintain financing over the long haul of the litigation—even if caused by dilatory, unlawful acts of the City—constituted a compensable "taking." *Id.* at 1386-87.

treatment of the law of inverse condemnation.<sup>105</sup> After twenty years, the facts of *Yardarm* are somewhat complicated, but the dispute started when the owners sued the City because it had revoked the permits it had previously issued, claiming the revocation was due to “administrative oversights.”<sup>106</sup> Two years later, a circuit court ruled that the City did have the right to rescind the permit.<sup>107</sup> The property owners did not appeal and instead resubmitted the plans in order to receive a new permit. The City denied the permit and once more the property owner sought relief. This time the court ruled in favor of the property owner, and the City once more issued a permit.<sup>108</sup>

Allegedly in some financial difficulty at this point, the property owners nevertheless began work on the project. Unfortunately, they soon discovered that the permit they had received was incomplete, so they once again sought approval from the City, which eventually issued permits for everything but the construction of an all-important dock.<sup>109</sup>

During the next decade, the City and property owners fought over the project continuously, and over the course of the ensuing litigation, the property owners were eventually forced to file for bankruptcy and lost the property through foreclosure. The owners then sued the City, claiming that the City’s extended obstruction of its construction project had worked an inverse condemnation of its property.<sup>110</sup>

The court first addressed the threshold question as to whether an actual “taking” had occurred. In determining that a compensable regulatory “taking” had *not* occurred, the court reaffirmed the well-established principle of law requiring the property owner in such cases to establish the complete deprivation of substantially all use of the property.<sup>111</sup> Here, the court noted that while the City may have acted “arbitrar[ily] and capricious[ly],” and not in the best interests of the public, these are references which typically denote a violation of due process and not necessarily a taking.<sup>112</sup> The court determined that the property owner’s ability to put the property to alternative uses during the period prior to 1981 when all requested

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105. *Yardarm*, 641 So. 2d at 1379-89.

106. *Id.* at 1379. The permit was issued based on a special-use exception to a height-restrictive ordinance the City passed as result of pressure from nearby residents. *Id.*

107. *Id.*

108. *Id.*

109. *Yardarm*, 641 So. 2d at 1379.

110. *Id.* at 1382.

111. *Id.* at 1384.

112. *Id.* at 1385.

permits had been issued, precluded a finding that the City had denied "all use" of the property.<sup>113</sup> As such, no taking had occurred.<sup>114</sup>

However, the court went further and determined that even if the City's actions constituted a taking, the four-year statute of limitations applicable to takings claims expired prior to the property owner filing the takings claim.<sup>115</sup> In so doing, the court rejected the owner's claim that it "could not bring a taking case against [the City] because it kept winning."<sup>116</sup> This case bodes a serious warning to those who believe they have such an action, to bring it before the action expires.

In *Tinnerman v. Palm Beach County*,<sup>117</sup> the Fourth District Court of Appeal held a suit for inverse condemnation based on a conditioned moratorium/delay in the County's issuance of building permits was not ripe because: 1) the record revealed the County had not actually made a "final" decision on the matter; 2) plaintiff had not taken sufficient steps to "alter" the County's decision; and 3) plaintiff failed to establish the absence of any alternative uses for the property during the temporary period in which the permit did not issue.<sup>118</sup> The court also noted that plaintiff had not taken sufficient steps to determine whether an alternative plan could have forced the City into lifting the challenged moratorium on building permits.<sup>119</sup> The court found that a plaintiff in such a case cannot establish the "futility" of taking such action, unless "at least one meaningful application has been filed."<sup>120</sup> The court then decided the absence of a firm determination by the government as to the permissible uses of the property precluded any inference that plaintiff has lost "all economically viable use" of the property so as to constitute a taking.<sup>121</sup>

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113. *Id.* at 1386; *cf. Bello v. Walker*, 840 F.2d 1124 (3d Cir.) (holding that denial of a certain kind of permit insufficient to establish a taking when property owner retains right to put property to multiple alternative uses), *cert. denied*, 488 U.S. 868 (1988).

114. *Yardarm*, 641 So. 2d at 1387.

115. *Id.* at 1388. The court mentioned § 95.11(3)(f) and § 95.11(3)(p) of the *Florida Statutes* which might govern such actions, both of which contain a four-year limitations period. *Id.* at 1387.

116. *Id.* at 1388.

117. 641 So. 2d 523 (Fla. 4th Dist. Ct. App. 1994).

118. *Id.* at 525-26.

119. *Id.* at 526-27.

120. *Id.* at 526 (citing *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990)).

121. *Id.*

In *Key West v. Berg*,<sup>122</sup> the Third District Court of Appeal held a property owner's claim for regulatory taking was not ripe because the owner had not even applied for a permit under the challenged plan.<sup>123</sup> Noting that the plan contained a "beneficial use exception," and rejecting the trial court's determination that an application would be "futile," the court concluded it was too soon to tell if the plan would actually deprive the owner of all economical use of the property.<sup>124</sup>

In February, of 1995, the First District Court of Appeal issued *City of Jacksonville v. Wynn*.<sup>125</sup> In *Wynn*, the court reiterated the established principle that a question of taking is not ripe for judicial resolution until the property owner has received a "final" determination from the government as to the permissible uses of the property.<sup>126</sup>

In *Wynn*, several residential lot owners sued the City for a commercial rezoning after their requests had been denied by the City for failing to comply with its comprehensive plan. The circuit court found that the plan had affected a taking, and the City appealed.<sup>127</sup> Amidst a host of other issues, the appellate court discussed "ripeness" and the similarities between due process and takings claims, and concluded that both require some sort of "final" determination before they may be adjudicated.<sup>128</sup> The court found that the property owners had not received a "final" decision, in that they had not submitted any specific plan to develop the property, or sought any amendment to the comprehensive plan.<sup>129</sup> The court concluded that a taking could not have occurred because the City had not even been afforded the opportunity to apply its plan to the property in question.<sup>130</sup>

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122. 655 So. 2d 196 (Fla. 3d Dist. Ct. App.), *review denied*, 663 So. 2d 629 (Fla. 1995).

123. *Id.* at 196. The challenged portion of the plan restricted the development of "wetlands." *Id.*

124. *Id.*

125. 650 So. 2d 182 (Fla. 1st Dist. Ct. App. 1995).

126. *Id.* at 188; *see also* Glisson v. Alachua County, 558 So. 2d 1030, 1035-36 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990); *Moviematic v. County Comm'rs*, 349 So. 2d 667 (Fla. 3d Dist. Ct. App. 1977).

127. *Wynn*, 650 So. 2d at 184.

128. *Id.* at 187. As Judge Kahn put it, "a court cannot determine that a regulation has gone too far until the court actually knows how far the regulation goes." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

129. *Id.*

130. *Id.*

#### D. The "Reservation Map" Cases

In *Tampa-Hillsborough Expressway Authority v. A.G.W.S.*,<sup>131</sup> the supreme court held that the filing of a map of reservation, in and of itself, does not constitute a per se regulatory taking, nor does it relieve the petitioner of the burden of establishing that the mere filing of the map effectively deprived it of all economically viable use of the land.<sup>132</sup> However, if that fact can be established, the filing could constitute a taking.<sup>133</sup>

In *Tampa-Hillsborough County Expressway Authority v. Harrell*,<sup>134</sup> the Second District Court of Appeal reversed a damage award given for a temporary taking which had allegedly been caused by the Authority's filing of a reservation map.<sup>135</sup> Relying on *A.G.W.S.*, the court reminded the petitioner that in order to establish a taking based on the filing of a map of reservation, the affected landowner must first establish that the filing of the map, in and of itself, denied the owner all economically viable use of the property.<sup>136</sup>

In an almost identical decision, the Fifth District Court of Appeal, in *Department of Transportation v. Zyderveld*,<sup>137</sup> added that the focus of such inquiries should always be directed at "the extent of the interference or deprivation of economic use."<sup>138</sup> In reaching this conclusion, the court

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131. 640 So. 2d 54 (Fla. 1994).

132. *Id.* at 58. The court stated: "A taking occurs where regulation denies substantially all economically beneficial or productive use of land." *Id.* at 58. The court also noted that even a "temporary deprivation" may be compensable, but only when the deprivation is of substantially all economic use. *Id.* (citing *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990)).

133. *Id.*

134. 645 So. 2d 1026 (Fla. 2d Dist. Ct. App. 1994).

135. *Id.* at 1027.

136. *Id.*

137. 647 So. 2d 308 (Fla. 5th Dist. Ct. App. 1994).

138. *Id.* at 309 (citing *Department of Transp. v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1993), *approved*, 640 So. 2d 73 (Fla. 1994); *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 625 (Fla. 1990)).

pointed out that it is the petitioner in such cases who has the burden of establishing the debilitating effect caused by the filing of the map.<sup>139</sup>

### E. *Miscellaneous*

In November of 1994, the Fifth District Court of Appeal decided *White v. Department of Transportation*,<sup>140</sup> wherein it found that a trial court erred by requiring a condemnee to publish a portion of a report prepared for him by an appraiser he did not call to testify.<sup>141</sup> The court found it was impermissible for the condemnor's attorney to cross-examine the condemnee on the contents of this report, and thus create an inference for the jury that the information was being "cover[ed] up."<sup>142</sup>

In *Sarasota County v. Ex*,<sup>143</sup> the Second District Court of Appeal reversed a finding of inverse condemnation based on an allegedly "involuntary" dedication of land which had occurred some eight years before the landowner filed the action.<sup>144</sup> Noting that even the "longest" applicable statute of limitations was no more than seven years,<sup>145</sup> the court found the action time-barred.<sup>146</sup>

The following month, in *Heckman v. City of Oakland Park*,<sup>147</sup> the Fourth District Court of Appeal held the statute of limitations for an inverse condemnation action grounded on an unlawfully-extracted dedication of

139. *Zyderveld*, 647 So. 2d at 308 (citing *A.G.W.S.*, 640 So. 2d at 54). The court also noted that a claim for severance damages, as alleged by the petitioner, only arises when there has been a "partial" taking. In this regard, the court found that the trial court erred in allowing the condemnee's expert to testify on the issue of severance because he had already stated, quite contrarily, that the actions of the Department had caused the petitioner to incur a total (albeit, temporary) taking, rather than a partial one. *Id.*

140. 645 So. 2d 114 (Fla. 5th Dist. Ct. App. 1994).

141. *Id.* at 115.

142. *Id.*; see *Sun Charm Ranch, Inc. v. City of Orlando*, 407 So. 2d 938, 940-41 (Fla. 5th Dist. Ct. App. 1981) (disallowing any inference that a party who hires, but fails to call, an expert witness is covering up harmful evidence or concealing bad facts).

143. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 654 So. 2d 918 (Fla. 1995).

144. *Id.* at 10.

145. The court actually never stated which statute of limitations applies to eminent domain cases, but it did cite § 95.14 of the *Florida Statutes*, which governs actions founded on title to real property. *Id.*

146. *Id.* Although the court never stated it, the opinion implies that the petitioner's cause of action began to run at the time of the "forced" conveyance.

147. 644 So. 2d 525 (Fla. 4th Dist. Ct. App. 1994).

property begins to run at the time of the “forced” conveyance,<sup>148</sup> and not at the time the resolution which requires the dedication is passed.

In a companion case, the Fourth District Court of Appeal held that the city had not acted as an “agent” of the Department of Transportation by requiring the property owners to dedicate the required easement in order to get the permit—an easement the city then intended to turn around and give to the Department.<sup>149</sup> Without sufficient record evidence to establish that the city was actually acting as the Department’s agent, the court refused to allow recovery against the Department.<sup>150</sup>

In *City of Jacksonville Beach v. Prom*,<sup>151</sup> the First District Court of Appeal reversed an order of regulatory taking because the property owner had failed to exhaust his administrative remedies.<sup>152</sup> The court discussed the evolving nature of the “comprehensive plan,” as outlined in Florida’s Local Government Comprehensive Planning Act, and concluded that the owner’s failure to request an amendment or conditional approval to the City’s comprehensive plan, which was also permitted under the local municipal code, negated the trial court’s finding that the owner had exhausted all administrative remedies.<sup>153</sup> The case stands as a reminder to condemnee’s counsel to make sure to identify and exhaust all administrative remedies before filing a suit for inverse condemnation.

At the same time, counsel must also be sure to file the “taking” action in the right forum. In *Ortega v. Department of Environmental Protection*,<sup>154</sup> the First District Court of Appeal affirmed a decision issued by the Department of Environmental Protection which had dismissed a takings claim for lack of jurisdiction.<sup>155</sup> Citing *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*,<sup>156</sup> the court pointed out that administrative agencies may not adjudicate takings claims; rather, jurisdiction lies exclusively with the circuit court.<sup>157</sup>

148. *Id.* at 527.

149. *Department of Transp. v. Heckman*, 644 So. 2d 527, 529 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995).

150. *Id.*

151. 656 So. 2d 581 (Fla. 1st Dist. Ct. App. 1995).

152. *Id.* at 582-83.

153. *Id.* The court also found no support in the record to indicate that an attempt to seek an exception or amendment to the plan would be “futile.” *Id.* at 583.

154. 646 So. 2d 797 (Fla. 1st Dist. Ct. App. 1994).

155. *Id.* at 797.

156. 427 So. 2d 153 (Fla. 1982) (holding that circuit courts have jurisdiction over valid takings claims).

157. *Ortega*, 646 So. 2d at 797.

In *Sarasota County v. Taylor Woodrow Homes Ltd.*,<sup>158</sup> the Second District Court of Appeal reversed a circuit court's dismissal with prejudice, whereby the County's attempted to specifically enforce a 1974 contract dedication.<sup>159</sup> The County brought suit for declaratory judgment and specific performance after the property owner refused to effect the dedication, claiming the 1974 exaction constituted an unauthorized taking under current constitutional law.<sup>160</sup> The circuit court dismissed the action because the County failed to allege the existence of an enacting ordinance or establish a "rational nexus" between the dedication and the "negative impact" expected from the proposed development.<sup>161</sup> The circuit court determined that the dedication was void ab initio based on 1974 law and the current pleadings.<sup>162</sup>

The Second District Court of Appeal, noting the absence of any meaningful factual record, and the complicated nature of the issues raised by those facts, was unconvinced that the dedication should be declared void based solely on the pleadings, and—troubled by the lengthy delay by the owner in asserting the taking—it refused to take such harsh steps.<sup>163</sup> The court then skirted the constitutional question by finding that the County's complaint established a right to declaratory relief, and that as such, the trial court had erred in dismissing it.<sup>164</sup>

In addition, the court made sure to formally acknowledge the recent line of opinions by the Supreme Court of the United States, which hold that a property owner cannot be compelled to give up a constitutional right to property in exchange for a discretionary benefit if the property sought has little relationship to the benefit.<sup>165</sup> The court reconfirmed the notion that a government cannot condition the issuance of a permit upon a specific condition without (1) establishing an "essential nexus"<sup>166</sup> between the condition and a legitimate state interest and (2) producing an individualized

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158. 652 So. 2d 1247 (Fla. 2d Dist. Ct. App. 1995).

159. *Id.* at 1248.

160. *Id.* at 1250.

161. *Id.*

162. *Id.* at 1251.

163. *Sarasota*, 652 So. 2d at 1250-51.

164. *Id.* at 1251.

165. *Id.*; see, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

166. The court actually found the "essential nexus" requirement was satisfied in 1974, but was unable to determine the issue of "rough proportionality" without more facts. *Sarasota*, 652 So. 2d at 1252.



determination as to the “rough proportionality” existing between the dedication and the nature and extent of the development’s impact.<sup>167</sup>

Recently, in *City of Dania v. Broward County*,<sup>168</sup> the Fourth District Court of Appeal refused to allow the City to intervene in an eminent domain action brought by the County against several properties located within the boundaries of the City.<sup>169</sup> The City argued it should be permitted to intervene in the taking because the County condemnation would effectively cause it to incur a loss of tax base and other infrastructure expenditures.<sup>170</sup> Noting the City’s failure to provide it with any legal authority which would permit it to recover something in the eminent domain proceeding, the court held the City had no grounds to intervene.<sup>171</sup>

#### F. *Public Purpose*

In *Basic Energy Corp. v. Hamilton County*,<sup>172</sup> the First District Court of Appeal found there was no “municipal purpose” in a municipality’s attempt to condemn land for subsequent donation to the state for use as a state prison.<sup>173</sup> Acknowledging that such a donation might very well be “incidentally relate[d]” to the protection and well being of the municipality’s residents, the court found the relationship was insufficient to establish a primarily “municipal purpose,” rather than one which would benefit the citizens of the state as a whole.<sup>174</sup>

167. *Id.* at 1251.

168. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995).

169. *Id.* at 166.

170. *Id.* at 165.

171. *Id.* at 165-66. The court affirmed the trial court order which had denied the City the right to intervene in the taking, but it did not rule out the possibility that the City might be entitled to relief “in more appropriate proceedings.” *Id.* at 166.

172. 652 So. 2d 1237 (Fla. 1st Dist. Ct. App. 1995).

173. *Id.* at 1239.

174. *Id.*; see *State v. City of Orlando*, 576 So. 2d 1315 (Fla. 1991) (holding that “[a] municipality exists in order to provide services to its inhabitants”); *State v. City of Jacksonville*, 50 So. 2d 532 (Fla. 1951); *City of Winter Park v. Montesi*, 448 So. 2d 1242, 1244 (Fla. 5th Dist. Ct. App.), *review denied*, 456 So. 2d 1182 (Fla. 1984). The City argued, quite unsuccessfully, that § 180.06 of the *Florida Statutes*, granting cities the authority to construct and operate “jails,” provided it with a valid “municipal” purpose. The court rejected this contention by noting that the City never intended to operate a jail; it just donated the land to the state so the state could use it for a prison. *Basic Energy*, 652 So. 2d at 1238. The court also explained that the real question in these cases is not whether a particular statute will permit the City to exercise a specific scope of authority, but whether the exercise of authority is actually for “a valid municipal purpose.” *Id.* at 1239 (citing *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992)).

In *JFR Investment v. Delray Beach Community Redevelopment Agency*,<sup>175</sup> the Fourth District Court of Appeal found an “[i]ncidental private use . . . is permissible where the overall purpose of the taking is clearly and predominately a public one.”<sup>176</sup> In *JFR*, the municipality declared a large tract of land to be blighted and a slum and in determining it needed rehabilitation, created a community development agency to effect that rehabilitation.<sup>177</sup> The project included a combination of public facilities, retail and office space, and an entertainment center. The “taken” property was acquired to serve, in part, as a parking lot for these facilities.<sup>178</sup> The court held that such “incidental” use can be permissible if the overall purpose is “predominately a public one.”<sup>179</sup>

### G. Valuation Issues

In *Finkelstein v. Department of Transportation*,<sup>180</sup> the Supreme Court of Florida answered a question certified to it<sup>181</sup> by the Fourth District Court of Appeal concerning the relevance of environmental contamination to issues of valuation. Not surprisingly, the court held evidence of environmental contamination can be relevant if an appropriate factual predicate is laid linking the contamination to value.<sup>182</sup> Reminding the litigants that the focus of opinion testimony in such cases must always be on “value,” the court held evidence of contamination can be relevant, but only if coupled with expert testimony, based on hard data,<sup>183</sup> all of which specifically establishes the contamination resulted in a decrease in value.<sup>184</sup> The

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175. 652 So. 2d 1261 (Fla. 4th Dist. Ct. App. 1995).

176. *Id.* at 1263.

177. *Id.* at 1262.

178. *Id.* at 1263. The taken property was also to be used as allocation for two publicly owned “historic houses.” *Id.* at 1262.

179. *JFR*, 652 So. 2d at 1263 (citing *Grubstein v. Urban Renewal Agency of Tampa*, 115 So. 2d 745 (Fla. 1959)).

180. 656 So. 2d 921 (Fla. 1995).

181. *Id.* at 922-23, 924. The Fourth District Court of Appeal certified a “question,” but the Supreme Court of Florida never received it. Instead, the court used a question formulated by agreement of the parties: “Whether evidence of environmental contamination is relevant and otherwise admissible in an eminent domain valuation trial.” *Id.* at 922.

182. *Id.*

183. *Id.* at 925. The court stated: “There must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.” *Finkelstein*, 656 So. 2d at 925.

184. *Id.* The court noted that the condemnor in such cases has the burden of establishing the effect of the contamination on value, and also emphasized the importance

burden on establishing that decrease in value is on the condemning authority.<sup>185</sup>

## H. *Business Damages*

In a somewhat disturbing (for condemnees) statement of law contained in *Weaver Oil Co. v. City of Tallahassee*,<sup>186</sup> the Supreme Court of Florida held section 73.071(3) of the *Florida Statutes* only authorizes business damages in cases where the damages have been incurred from a partial taking of "land," as opposed to a taking of "access."<sup>187</sup> Quoting directly from its 1964 decision in *State Road Department v. Lewis*,<sup>188</sup> the court, somewhat unnecessarily,<sup>189</sup> reaffirmed its interpretation of the language of section 73.071(3), by specifically holding that business damages may not be recovered under this provision unless the condemnee can establish they were caused by a partial taking of "land."<sup>190</sup>

Because the taking in *Weaver* was based solely on an alleged "loss of access" caused by the construction of a traffic island on the publicly owned right-of-way, the court concluded that no "land" had actually been taken.<sup>191</sup> Thus, while the City's action might have effectively diminished the extent and nature of the property owner's access, it did not technically constitute a taking of "land," and as such, business damages were not compensable under the strict wording of the statute.<sup>192</sup>

In a business damage case of somewhat lesser significance, *Department of Transportation v. Manoli*,<sup>193</sup> the Fourth District Court of Appeal held that when a court awards business damages based upon lost profits to a property owner running a "self-employed" business, it must be sure to

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of "timing" in such calculations. *Id.* This would mean that the condemnor must establish that the contamination existed "at the time of the taking," so as to link up with the appropriate time of valuation (i.e., the "time of the taking"). See FLA. STAT. ch. 73 (1995).

185. *Finkelstein*, 656 So. 2d at 925 (citing *City of Fort Lauderdale v. Casino Realty, Inc.*, 313 So. 2d 649, 652-53 (Fla. 1975)).

186. 647 So. 2d 819 (Fla. 1994).

187. *Id.* at 822-23.

188. 170 So. 2d 817 (Fla. 1964) (holding that a partial taking of access will not support claim for business damages).

189. It is unclear from the opinion whether the court needed to make this finding after having already found that there had been no taking at all. *Weaver*, 647 So. 2d at 822 (finding no compensable loss of access).

190. *Id.* at 822-23.

191. *Id.* at 822.

192. *Id.* at 822 n.1.

193. 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994).

deduct the reasonable value of the self-employed owner's services from the profits—as it would with any other employee wages.<sup>194</sup>

## I. Severance Damages

In *Orlando/Orange County Expressway Authority v. Latham*,<sup>195</sup> the Fifth District Court of Appeal found the trial court erred in excluding the condemnor's expert testimony as to severance damages.<sup>196</sup> The court determined that the proffered testimony concerning an alleged right to an east-west arterial access was relevant, and thus concluded the severance issue was not improperly presented below.<sup>197</sup> In light of recent developments in *Department of Transportation v. Gefen*<sup>198</sup> and *Broward County v. Patel*,<sup>199</sup> the court determined a remand would be the most appropriate remedy under the circumstances.<sup>200</sup>

In *Brevard County v. Canaveral Properties, Inc.*,<sup>201</sup> the Fifth District Court of Appeal reversed an award of severance damages grounded on a finding of a "parent parcel"<sup>202</sup> as is defined in *Department of Transportation v. Jirik*.<sup>203</sup> The court found that the checkerboard-like, noncontiguous nature of the 499 lots, the lack of any coventure or partnership agreement between the various property owners, and the historical treatment of the lots as individual parcels indicated a "diversity of ownership, diversity of usage and an absence of contiguity."<sup>204</sup> The court noted that in cases where the condemnee seeks severance damages, the burden is on the condemnee to

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194. *Id.* at 1094-95.

195. 643 So. 2d 10 (Fla. 5th Dist. Ct. App. 1994).

196. *Id.* at 11.

197. *Id.*

198. 636 So. 2d 1345 (Fla. 1994).

199. 641 So. 2d 40 (Fla. 1994) (holding that possibility of securing future rezoning or variance may be admitted on severance issue under certain circumstances).

200. *Latham*, 643 So. 2d at 11.

201. 658 So. 2d 590 (Fla. 5th Dist. Ct. App. 1995).

202. *Id.* at 590.

203. 498 So. 2d 1253 (Fla. 1986). *Jirik* concerned three separate but contiguous parcels of land—all owned by the same person. The sole issue in the case concerned "unity of use," which is the primary criteria used to determine whether contiguous parcels of land should be considered as "one parcel" or separate and independent. *Id.* at 1255. If property is not in use, however, "unity of use" becomes problematic. In such cases, there is a presumption of "separateness" as to vacant platted urban lots, which can be rebutted by contrary evidence. *Canaveral Properties*, 658 So. 2d at 590-91 (citing *Jirik*, 498 So. 2d at 1256-57).

204. *Canaveral Properties*, 658 So. 2d at 591.

establish the basis for such damages.<sup>205</sup> In this case, the condemnee had to show that despite the disparate ownership and physical separation of the 499 lots, their proximity and integration of use was so substantial, that the lots were in effect "one lot."<sup>206</sup> The court found the owners had not met that burden.<sup>207</sup>

#### IV. CONCLUSION

Florida's appellate courts issued a number of interesting opinions in condemnation law over the last year. Perhaps more importantly, however, the legislature made sweeping changes in the ways fees and costs are awarded in such cases. These changes are quite controversial and are sure to be challenged. Next year should prove to be even more interesting.

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205. *Id.*

206. *Id.*

207. *Id.*